92-1237

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PHILLIP LEE HULL, a minor by his natural parents, guardians, and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 19, 1993

QUESTION PRESENTED

1. Whether the district court, in a case arising under the Federal Tort Claims Act, has the power to order the creation of a "reversionary trust" funded by a money damage award which reverts to the tortfeasor upon the death of the minor tort claimant, even though the only remedy authorized by Congress is money damages?

LIST OF PARTIES

Petitioner:

Phillip Lee Hull, a minor, by his natural parents, guardians, and personal representatives, Phillip Gene Hull and Tanya Lee Hull, husband and wife

Respondent:

The United States of America

Other:

Judith Finn, Guardian ad Litem for Phillip Lee Hull, a minor

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PETITION FOR A WRIT OF CERTIORARI

Phillip Lee Hull, a minor, by his natural parents and personal representatives, Phillip Gene Hull and Tanya Lee Hull, husband and wife, hereby prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 10, 1992.

OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 1499 (10th Cir. 1992). Copies of that opinion, and the court's order denying petitioners' Motion for Partial Issuance of Mandate and Petition for Rehearing and Suggestion for Rehearing En Banc, are attached to this Petition as Appendix A and Appendix B, respectively. A copy of the Amended Findings of Fact and Conclusions of Law of the federal district court is attached to this Petition as Appendix C.

JURISDICTION

The opinion of the court of appeals was entered on August 10, 1992. On October 22, 1992, the court of appeals denied petitioners' timely Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1346(b) of Title 28 provides in pertinent part that the "district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred".

Section 2674 of Title 28 provides in pertinent part that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

STATEMENT OF THE CASE

A Cherokee Indian, Petitioner Phillip Lee Hull ("Lee") was born on June 28, 1987, at the Claremore Indian Hospital in Claremore, Oklahoma. The Claremore Indian Hospital is owned and operated by Respondent United States of America (the "Government"). (See p. A-30).

The Government admits that its doctors were negligent in delivering Lee and permanently injured him as follows: severe hypoxic ischemic encephalopathy (brain damage), cerebral palsy, with spastic quadriplegia, and developmental delay. (See p. A-30).

Although Lee suffers from these extensive injuries, his cognitive abilities remain generally intact. Experts testified that Lee is mildly retarded. They did not rule out the possibility that Lee might go to college.

Lee's parents, Phillip Gene Hull and Tanya Lee Hull, brought an action on behalf of their son for money damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The tort asserted was negligence (as defined by the common law of Oklahoma). (See p. A-29, 30).

The United States District Court for the Northern District of Oklahoma entered judgment in favor of Lee and against the Government for money damages in the following amounts:

$5,527,872.37	Medical services and support
784,717.50	Fund management
1,601,474.00	Lost wages and impairment of earning capacity
250,000.00	Pain and suffering
$8,165,063.87	TOTAL

(See p. A-32-35).

During proceedings of February 4, 1991, which culminated in the establishment of the Irrevocable Trust of

Phillip Lee Hull,[1] the District Court made the following comment:

> [T]he real issue here is what is [in] the best interest of Phillip Lee Hull. If I had the power I would make every dollar awarded reversionary. I'm not convinced that I have that authority under the law . . . . That is, if anything were to happen to Phillip, if he were to die or if he were to be institutionalized . . . . I'm not at all convinced that I can enter such an order.

(p. A-6).

On appeal to the Tenth Circuit, the Government argued that the District Court did have the power to order a fully reversionary trust -- that is, a trust in which all assets remaining in the trust would revert (forfeit) to the Government upon Lee's death. (See p. A-5).

In an opinion filed on August 10, 1992, the Tenth Circuit held that a district court has the inherent power to establish an irrevocable trust in which the entire trust estate reverts to the defendant Government automatically and immediately upon the death of Lee Hull. The Tenth Circuit's opinion did not limit the reverter to damages awarded for future medical care, only. It included a reverter of the entire trust estate which is also comprised of money damages awarded to Lee for Lee's own pain and suffering and lost wages. (See p. A-6-13).[2]

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1 The Irrevocable Trust was established by the District Court on April 11, 1991, filed of record on April 15, 1991, and incorporated into the District Court's April 12, 1991, Amended Findings of Fact and Conclusions of Law. This trust does not contain a provision which causes a reversion to the Government upon the death of Lee Hull. (See p. A-35-49).

2 Upon remand by the Tenth Circuit the District Court ordered the parties to submit an agreed form of trust which provides that trust assets will revert to the Government upon Lee's death. As a consequence, the

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the opinion of the Tenth Circuit conflicts, directly or in principle, with decisions of the First, Second, Third, and Seventh Circuits.

Without congressional authorization, the Tenth Circuit has created a new remedy under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The opinion authorizes district courts to create "fully reversionary trusts" in favor of the Government. (See p. A-7). Such trusts are funded by the Government in amounts that are based upon the money damages awarded to the tort claimant. The assets of the trust would revert to the Government -- that is, to the tortfeasor -- upon the occurrence of certain defined events (e.g., the death of the tort claimant).

The Federal Tort Claims Act contemplates a lump sum payment to a plaintiff, not a "reversionary trust". Section 1346 (b) provides that

> the district court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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propriety of the "fully reversionary trust" remedy remains an issue of vital interest in the proceeding below.

(Emphasis added). See 2 Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies §225 at 10-6 & n.14 (1992) (hereinafter, "Jayson"); 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d §3658 at 325 & n.45 (1985).

By authorizing the novel remedy of a "fully reversionary trust", the Tenth Circuit's opinion directly conflicts with the Third Circuit's decision in Frankel v. Heym, 466 F.2d 1226, 1228-1229 (3d Cir. 1972). In Frankel, the Third Circuit affirmed a district court's decision not to establish a fully reversionary trust. Id. at 1228.[3]

The Frankel court held:

> We agree with the district court that in administering the legislation in question a district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them . . . . The district

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3 In a footnote, the Third Circuit observed that:

> The obvious advantage of this arrangement [i.e., the reversionary trust] would be to prevent the award, intended as compensation to the injured person, from becoming a windfall to others who would control its use and disbursement.

Notwithstanding the "obvious advantage" of the reversionary trust the Third Circuit held that a reversionary trust was not a proper remedy.

> court also alluded to the continuing burden of judicial supervision that would attend a judgment creating a life trust. This too is a consideration against the government's proposal.

Id. at 1228-29.[4]

The Second Circuit follows the Third Circuit approach. See Andrulonis v. United States, 724 F.Supp 1421, 1519-1520 & n.616 (N.D.N.Y. 1989) (citing Frankel with approval), aff'd in part and rev'd in part on other grounds, 924 F.2d 1210 (2d Cir.), vacated sub nom. New York State Dep't of Health v. Andrulonis, 112 S.Ct. 39, previous op. reinstated after remand, 952 F.2d 1210 (2d Cir. 1991), cert. denied, 112 S.Ct. 2992 (1992).

The Tenth Circuit's opinion also conflicts in principle with the Seventh Circuit's decision in Nemmers v. United States, 795 F.2d 628, 635-36 (7th Cir. 1986). In Nemmers, the Seventh Circuit declined to reduce a damage award rendered to a minor claimant's parents under the Federal Tort Claims Act. The Nemmers court rejected the Government's argument that a high damage award would result in a "windfall" to the guardian of a minor tort claimant. 795 F.2d at 635. The Nemmers court observed that "stingy" awards penalize relatives who contribute to the care of minor tort claimants. Id. at 636. The Tenth Circuit, in contrast, is suspicious regarding the motives and intentions of the tort victim's parents. (See p. A-5, n.2, A-6).[5]

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4 In its opinion, the Tenth Circuit emphasized that the trust agreement in Frankel contemplated "continuing payment". (See p. A-9). The distinction is specious. A right of reversion (in favor of the tortfeasor) is as much a departure from the statute as continuing or installment payments. Both can be lumped together as "novel types of awards". 466 F.2d at 1229.

5 On this point, compare the Tenth Circuit's opinion at p. A-5, n.2 (suggesting that Lee might die at his parents' hands) with the District Court's opinion at p. A-36, that Lee "can obtain his maximum

In Nemmers, the Seventh Circuit observed in dicta that "[a] reversionary trust might be useful when there is great uncertainty about the victim's life expectancy, as in Robak v. United States, 503 F.Supp. 982, 983 (N.D.Ill. 1980), rev'd on other grounds, 658 F.2d 471, 479 (7th Cir. 1981)." Nemmers, 795 F.2d at 636, n.4. Under the Tenth Circuit rule no showing of uncertainty about the victim's life expectancy is necessary to justify the use of a reversionary trust. The Tenth Circuit assumes that "[t]here will almost always be uncertainty about the life expectancy of a severely injured child". (See p. A-12). In contrast, the Seventh Circuit apparently requires the submission of evidence regarding life expectancy or tenuous health status. See Nemmers, 795 F.2d at 636, n.4; Robak, 503 F.Supp. at 983.[6]

The Tenth Circuit's opinion also conflicts in principle with the First Circuit's opinion in Reilly v. United States, 863 F.2d 149 (1st Cir. 1988). In Reilly, the First Circuit approach adopted and endorsed the rule of Frankel v. Heym. According to the Reilly court, a district court's authority to award damages under the Federal Tort Claims Act is limited to "making lump-sum judgments". 863 F.2d at 189. See Jayson §225 at 10-6 and 10-7 & n.13 (discussing the lower court opinion in Reilly).[7]

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development potential in a home environment supplied by his mother and father".

6 There is no evidence of uncertainty regarding Lee's life expectancy. The District Court found that

> Plaintiff Phillip Lee Hull . . . will have a life expectancy of 69.8 years from the time of the trial. This finding is based upon the totality of the expert testimony in the case. The most compelling and persuasive evidence is that Plaintiff, Phillip Lee Hull, will experience a full life expectancy. (See p. A-31).

7 The district court in Reilly observed that

> in the absence of agreement by the parties to structure the future care award, the law leaves the Court with no alternative but to order the payment of a lump sum judgment. Reilly v. United States, 665 F.Supp. 976, 1016 (D.R.I. 1987).

The district court in Reilly did approve a fully reversionary trust, but it was only as a result of an express agreement between the parties. The "plaintiffs" -- including the parents of the minor tortfeasor -- had consented to the creation of the trust. The propriety of the remedy was not appealed. 863 F.2d at 170. In the instant case, Lee's parents do not consent to the creation of an irrevocable fully reversionary trust.[8] As a consequence, Reilly is factually distinguishable. See Reilly, 863 F.2d at 170 (observing that absent a statute or the parties contrary agreement, the Government "must pay the judgment in one fell swoop"); id. at 169, citing Slater v. Mexican Nat'l R.R.Co., 194 U.S. 120, 128, 24 S.Ct. 581, 583, 48 L.Ed. 900 (1904) (Holmes, J.) (court lacked power to substitute lump sum, representing estimated present value of benefits awarded, for periodic

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8 The Tenth Circuit recites that "Lee has consented to a fully reversionary trust through his legal representative, the guardian ad litem". (See p. A-10-11). The Tenth Circuit opinion does not disclose that (i) the guardian ad litem was appointed upon the Government's motion; (ii) the guardian ad litem was appointed over the objection of Lee's parents; (iii) Lee's parents had already commenced proceedings in state court to appoint a guardian ad litem at the time the Government filed its motion; and (iv) the parents, not the guardian ad litem, brought this action for Lee and successfully maintained it, resulting in the money judgment awarded to their son.

The Tenth Circuit does not discuss the limits on the authority of a guardian ad litem to speak for a minor. The guardian ad litem is but an officer of the court. Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978).

In its opinion, the Tenth Circuit equates the consent of the guardian ad litem with the consent of the parents. As a matter of law, the natural parents are the guardian of the person of their son, Lee Hull. See Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963 (especially the statement of policy in §1902); Oklahoma Indian Child Welfare Act, 10 Okla. State. §§ 40-40.9 (1991); See also Johnson v. Howard, 741 P.2d 1386, 1387-1388 (Okla. 1985) (discussing the policy of the Indian Child Welfare Act of 1978 and the Oklahoma Indian Child Welfare Act --the Indian Child Welfare Act and the Oklahoma Indian Child Welfare Act have as their philosophy the preservation of the Indian family unit).

payments mandated by governing statute).

II. The Tenth Circuit's opinion appears to conflict with the prior decisions of this Court.

The Tenth Circuit seeks support for the creation of an equitable remedy -- an irrevocable fully reversionary trust -- in Kosak v. United States, 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed. 2d 860 (1984). (See p. A-10). According to the Tenth Circuit, Kosak stands for the proposition that

> courts should decide claims under the [Federal Tort Claims Act] "with justice and equity both the Government and to the claimants") (quoting Report of the Joint Committee on the Organization of Congress)".

(p. A-10).

The Tenth Circuit's reference is to a dissenting opinion in Kosak. The actual quotation from the committee report stands for the propositions (i) that federal courts can decide claims against the Government with justice and equity and (ii) that such claims need not be processed by the Congress by means of "private bills". See Kosak, 465 U.S. at 868, 104 S.Ct. at 1530. Kosak does not hold or intimate that the Federal Tort Claims Act vests district courts with the power to fashion equitable remedies.

In attempting to read broad equitable powers into the Federal Tort Claims Act, the Tenth Circuit disregards important admonitions from this Court. In Indian Towing Company v. United States, 350 U.S. 67, 76 S.Ct. 122, 100 L.Ed.2d 48 (1955), the Court warned that

> when dealing with a statute subjecting the Government to liability for potentially great

> sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Fully reversionary trusts give the Government an opportunity that is not available to private, non-governmental tortfeasors -- the chance to recoup damage award payments. This Court has consistently recognized that the purpose of the Federal Tort Claims Act is to allow a tort claimant to sue the Government as if the Government were a private individual. See Feres v. United States, 340 U.S. 135, 141, 71 S.Ct. 153, 157, 95 L.Ed. 152 (1950); Dalehite v. United States, 346 U.S. 15, 30, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953) (discussing 28 U.S.C. §2674). Inventing a new remedy -- a remedy that is not available to defendants in private tort actions -- does not advance the purposes of the Federal Tort Claims Act and is not consistent with this Court's prior cases.

III. The Tenth Circuit's opinion raises important and unresolved problems.

The Tenth Circuit's opinion raises three additional issues that are "beyond the academic or the episodic". Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). First, the opinion raises a question about a federal court's ability to devise and employ a remedy that was not contemplated by Congress. Theorists and judges have long debated the question of whether Congress's power to regulate federal court jurisdiction is also the power to control remedies. E.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: *An Exercise in Dialectic*, 66 Harv.L.Rev. 1362, 1366 (1953). The problem is particularly acute when the statute in question creates an exception to governmental immunity. See Jayson §225 at 10-7 n.14 (listing recently

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enacted statutes that allow courts more flexibility in remedies).

Second, the problem is frequently recurring. The same issues arise in other cases. E.g., Bean vs. United States of America, United States District Court for the Northern District of Oklahoma, Case No. 92-C-327-E (minor tort claimant born at Claremore Indian Hospital; parents object to appointment of guardian ad litem by federal court on request of the Government). Lower courts need guidance regarding the latitude afforded by the Federal Tort Claims Act. In particular, district courts and courts of appeals need answers to the following questions: Is there only one possible remedy under the statute -- lump sum payment of money damages? Can the district courts create and use equitable remedies not expressly authorized by the statute?

Third, the prestige of the Government is at stake. If the Tenth Circuit approach is allowed to remain in force, the Government will have a right that other tortfeasors do not enjoy. The Government will be able to take back its damage award. In a simpler, more innocent time this sort of usurpation might have been called "Indian-giving". See Tafoya v. City of Alburquerque, 751 F.Supp. 1527 (D.N.M. 1990); United States v. Ahtanum Irr. Dist., et al. 124 F.Supp. 818 (E.D.Wash. 1954).[9]

Lower courts need guidance from this Court as to the remedies available under the Federal Tort Claims Act. In addition, lower courts need guidance regarding a more general question -- the extent to which Congress can statutorily limit the district court's jurisdiction and ability to craft novel remedies.

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9 The "fully reversionary trust" remedy arguable results in a taking of the tort claimant's property. See Richard A. Epstein, Takings: Private Property and the Power of Imminent Domain 41 (1985) (the Federal Tort Claims Act "gives a legislative expression to the constitutional idea by presumptively holding the government liable for its torts on the principles applicable to private defendants").

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CONCLUSION

For these various reasons, this Petition for Writ of Certiorari should be granted. If the Petitioner is correct in urging that the Tenth Circuit lacked the authority to create an equitable remedy under the Federal Tort Claims Act, the matter should be remanded to the District Court for appropriate disposition with an instruction that a "fully reversionary trust" cannot be ordered as a remedy.

Respectfully submitted,

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